2

No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLANT.

DEVLIN & DEVLIN & DIEPENBROCK,
HORACE B. WULFF,
California State Life Building, Sacramento, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal by the Metropolitan Life Insurance Company, a corporation, defendant (appellant herein), from a judgment of the United States District Court, in and for the Northern Division, Northern District of California, in favor of the plaintiff, Amos Halcomb, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, in the sum of $4092.65, plus interest and costs.

Said judgment was entered pursuant to a verdict rendered by the jury at the trial of the action, wherein the plaintiff (appellee herein) sought to recover against the defendant (appellant herein) for an alleged breach in the performance of a policy of life insurance.

Metropolitan Life Insurance Company issued to George R. Halcomb its life insurance policy upon his life, in the principal sum of $2000.00, under date of April 13, 1928. Said policy provided for two types of indemnity payments; that is, the sum of $2000.00 to be paid to the administrator of the estate of said insured upon receipt of due proof of the death of the insured, and, secondly, the payment of the additional sum of $2000.00 under a double indemnity clause upon receipt of due proof of the death of the insured, "as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means, provided * * * (6) *that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare paying passenger,* * * *." (R. 27-28.) (Italics ours.)

George R. Halcomb died July 7, 1932 (R. 1) and the appellant has been at all times, and still is, ready and willing to pay the amount due under the single indemnity clause of said policy, and has tendered to the appellee the amount due, owing and payable thereunder, which said appellee has refused to accept. (R. 112.)

The sole question in the case is the right of the appellee to recover under the double indemnity clause hereinabove set forth.

George R. Halcomb met his death under the following facts and circumstances:

Ollie Rose owned two aeroplanes which he used in connection with his business of commercial aviation in the City of Redding, California. (R. 96.) Ollie Rose possessed a private pilot's license (R. 102, 111), as required by the Regulations of the Department of Commerce (Section 46, Subdivision (e) of Air Commerce Regulations), which license permitted him to operate a licensed aeroplane for the transportation of persons gratuitously, but not for hire. In the conduct of his commercial aviation business he employed a pilot, who possessed a transport pilot's license, for the purpose of operating aeroplanes carrying persons for hire. (R. 102.) Rose, to the knowledge of his wife, did not haul or carry passengers in aeroplanes for fare, but in all such transportation for hire the plane was operated by Lund, the transport pilot in the employ of Rose. (R. 102.)

On the 7th day of July, 1932, the brother of George R. Halcomb was lost in the woods in the vicinity of Redding for a period of time, and various unsuccessful searching parties had been organized for the purpose of locating said person. At about twenty minutes of two on the afternoon of July 7, 1932, said George Halcomb called at Rose's home, and Halcomb stated to Rose, in the presence of Mrs. Rose: "You know my brother is lost, and I came down to see if

you would take me up in the plane, I thought we might be able to see him up from the air". Rose replied: "Sure, I will do anything I can, anything under God's heaven I can do to help you, I am willing to do it". Rose then said: "When do you want to go, George?" To which Halcomb replied: "As soon as possible". It was then arranged by said parties to meet at the airport at two o'clock. (R. 101.) Halcomb then turned and went back to his automobile. Halcomb and Rose met at the air field and started the flight during which the aeroplane crashed, resulting in the death of both Halcomb and Rose. There were no other negotiations between Halcomb and Rose of and concerning that flight, other than above stated.

The question is whether, under the foregoing facts, there was an express or implied contract for the carriage of Halcomb on that flight for a fare, or, in other words, was Mr. Halcomb a "fare paying passenger" within the meaning of that phrase as set forth in said policy of life insurance.

The Air Commerce Act, Title 49 U. S. C. A., Section 181, provides that "it shall be unlawful, * * * to serve as an airman * * * without an airman certificate or in violation of the terms of any such certificate", and said section also provides for penalties, etc., for the violation of any of the Regulations of the Department of Commerce. The Air Commerce Act (Section 173 of 49 U. S. C. A.) also provides that the Regulations of the Department of Commerce shall have the force of law.

The State of California (1929 Statutes, pages 1874-1877) adopted the Air Commerce Regulations of the Department of Commerce as the law of the State of California, and it was therein provided that a violation thereof shall constitute a misdemeanor, punishable by fine or imprisonment.

The pilot Rose had a private pilot's license which entitled him to take up passengers as guests, but prohibited him from transporting passengers for a fare or consideration. (R. 110.) In view of the law hereinabove set forth, the question of law arose whether or not the decedent Halcomb was or could be a fare paying passenger in an aeroplane piloted by a pilot prohibited from transporting passengers for hire.

The defendant (appellant herein) made its motion for a nonsuit, which was denied, and later made its motion for a directed verdict, which was denied. The Court, in denying the same, held that if there was a contract by Rose to carry Halcomb as a passenger for a fare or for hire, such contract of carriage was illegal, being *malum prohibitum,* and therefore Rose could not have enforced the purported implied contract for the payment of a fare. But the Court further held that because the contract was "merely *malum prohibitum* it did not mean, however, that the contract itself may not be implied and may not in certain respects be enforceable". (R. 66.)

Based upon that holding said District Court submitted to the jury, in the form of a special verdict, the following:

> "Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? (Answer 'Yes' or 'No'.)" (R. 64.)

The jury returned the said special verdict with a finding of "Yes".

The trial Court thereafter reserved for its ruling the question of law of whether or not a contract could be implied when the subject-matter thereof was illegal, which matter was argued and submitted upon briefs. Thereafter, the Court filed its memorandum opinion holding that the plaintiff is entitled to a judgment for $4092.65, with interest at 3½%, as provided in the policy, from the date of the death of the insured less the indebtedness due from said insured to said insurance company upon the policy, together with costs of suit. Judgment was entered in conformity with said special verdict of the jury and the opinion of said Court, from which judgment this appeal was perfected.

QUESTIONS INVOLVED.

1. Whether the deceased was a "fare paying passenger".

2. Whether a contract can be implied where the subject-matter thereof is illegal.

3. Whether a contract can be enforced where the subject-matter thereof is *malum prohibitum* and not *malum in se.*

4. Whether the Court erred in admitting the testimony of the witness, Daniel Franklin Halcomb, over the objection of the defendant, to the effect that his brother had some three months prior to his fatal flight paid Mr. Rose $3.00 for a flight in an aeroplane operated by Ollie Rose.

5. Whether the Court erred in refusing to charge the jury with the following instructions:

> "You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed." (R. 83-84.)

6. Whether the Court erred in charging the jury as follows:

> "The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which

George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that such pilot, Ollie A. Rose was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law has been obeyed. This presumption is to be considered with all the other evidence in the case, to determine whether or not George R. Halcomb was a fare paying passenger in the wrecked aeroplane." (R. 84.)

"It is for you gentlemen of the jury to say, from all the evidence in this case, whether there was an implied contract that the deceased was to pay a fare for the use of the plane." (R. 85-86.)

I.

THE DECEASED WAS NOT A "FARE-PAYING PASSENGER".

The policy in question provides that the beneficiary is not entitled to the benefit of the double indemnity provision of said policy in the event that the death of the insured results "from bodily injuries sustained while participating in aviation or aeronautics *except as a fare paying passenger*".

The words "fare paying" as used in the policy, constitute a descriptive phrase defining the kind or class of passengers which the policy is intended to desig-

nate. The use of this language is to be construed in accordance with the rules applicable to the construction of contracts. Where there is no uncertainty or ambiguity in the language of the policy, there is no occasion for judicial construction, and the rights and liabilities of the parties must be determined in accordance with the plain, ordinary and popular uses of the language which they have used in their contracts.

Canton Ins. Office v. Independent Transp. Co., 217 Fed. 208, 214 (C. C. A. 9th);

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452-463, 38 L. ed. 231.

Further, the intention of the parties at the time of entering into a contract is a determining factor. Therefore, from the language of the policy and the plain intention of the parties, was the insured, at the time of his death, a fare paying passenger?

The word "fare" means the rate of charge for the carriage of passengers (25 *C. J.* 670); money paid for voyage or passage. (Bouvier's Law Dictionary.) A charge is a fixed rate or demand for services rendered.

Fulmer v. Southern Ry. Co., 45 S. E. 196;

Clark v. Southern Ry. Co., 119 N. E. 539, at 542.

The word "fare" implies or is defined to be a fixed charge. It implies or should imply, not only the right to ride and pay for passage, but the right to carry and receive compensation for passage. There must be a contract on the part of the passenger to pay a fixed charge for passage, and on the part of the carrier to receive such compensation.

There is no evidence, and we understand it is conceded by appellee, that the insured made no contract to pay a fixed charge or fare to Ollie Rose, the owner and pilot of the aeroplane, for his said transportation. Nor was any fare paid by the insured or accepted by the pilot. This being true there can be no basis for a recovery by the plaintiff (appellee here) in this action.

The identical policy form involved in this action was likewise involved in *Padgett v. Metropolitan Life Insurance Company,* 173 S. E. 903 (North Carolina), where, also as here, the insured was riding as a passenger in an aeroplane operated by a pilot possessing merely a private pilot's license. The Metropolitan Life Insurance Company in the above cited case made the same contention that is made here, that is, that the plaintiff was not entitled to recover under the double indemnity clause on the ground that the death of the insured resulted from bodily injuries sustained by him while participating in aviation or aeronautics otherwise than as a fare paying passenger. In denying recovery to the plaintiff in that case, the Court said:

> "All the evidence tended to show that at the time he sustained his fatal injuries, the insured was participating in aviation or aeronautics. He was riding in an aeroplane, en route from Lincolnton, N. C., to Charlotte, N. C. There was no evidence tending to show that the insured was a fare-paying passenger. He was riding in the aeroplane with his employer, E. H. Byars Jr., who held a Private Pilot's License, issued to him by the United States Department of Commerce. *It was expressly provided in said license that the holder thereof was not authorized to transport*

persons or property, for hire. All the evidence showed that the insured was riding with his employer, upon the latter's invitation, and that no fare was paid or contemplated by either. There was no error in the judgment dismissing the action." (Italics ours.)

From the above cited rules of interpretation it must be assumed that the insurer had some sound reason for using the language "fare paying passenger", which must be interpreted as intended and according to its true meaning. The contract undertakes to cover any death resulting from violence as above described in the policy, but expressly provides that it does not cover death resulting from participation in aviation or aeronautics, except as a "fare paying passenger". The reason for this exclusion is because of the great dangers incident to promiscuous flying by and with those not properly experienced.

The insurer was willing however, to make an exception to the general exclusion clause in accidents occurring to a fare paying passenger, because of the comparative safety in travel by aeroplanes for hire, when regulated by the Government and the State, and operated by experienced pilots licensed by the Federal Government. It is a well known fact that this method of passage has become comparatively safe.

Surely the policy did not mean that any person who was not licensed to carry passengers for hire can take up a person, as in the instant case, and then such person successfully contend that he was a "fare paying passenger". If so, the language has no meaning and the purpose of the insurer in using it is in vain.

II.

A CONTRACT CANNOT BE IMPLIED WHERE THE SUBJECT-MATTER IS ILLEGAL.

From the foregoing evidence it is conceded and held by the Court (see opinion of Court, R. 63, *et seq.*) that there was no express contract between George Halcomb and Ollie Rose wherein and whereby Halcomb agreed to pay to Rose a fare for the transportation in the aeroplane in question. The evidence is further undisputed that Halcomb did not pay a fare, and that there was nothing in said negotiations for the aeroplane transportation about the payment of a fare.

The plaintiff can consequently recover only if there was an implied contract by Halcomb to pay a fare to Rose. The trial Court held, and properly so, that in the event Halcomb refused to pay a fare, Rose, the pilot, could not enforce the purported implied contract or in any manner legally obligate Halcomb to pay such a fare. (R. 66.)

When a contract is made by a party required by law to have a license before entering into such contract, such contractor cannot compel the other party to pay the purchase price in the event that such contractor does not possess the license required by law, and even though the contract has been fully performed by the seller. See:

William Stake & Co. v. Roth, 154 N. Y. S. 213;

Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759.

The question then remains whether or not the law will imply a contract when the parties cannot legally

make an express contract upon such subject-matter, or, in other words, will the law imply a contract which is contrary to law. The principle is well established that a contract will not be implied when the parties cannot legally make an express contract covering such subject-matter. This principle is well established in the State of California, and it suffices to cite the early and leading case on that question, to-wit, *Zottman v. San Francisco,* 20 Cal. 96, in which case the Court stated (p. 108):

> "The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and *the law never implies an obligation to do that which it forbids the party to agree to do.*" (Italics ours.)

The *Zottman Case, supra,* was approved by this Court in *City of Astoria v. American La France Fire Engine Co.,* 225 Fed. 21, at page 26, where this Court held that where an express contract covering the subject-matter of an implied contract is void, being prohibited by law, no contract can be implied, or, in other words, "the law never implies an obligation to do that which it forbids the party to agree to do".

In *Potter v. Florida Motor Lines,* 57 Fed. (2d) 313, at 316, the Court said:

> *"It is no answer to say that the contract is not one made by the parties, but is one implied by law. The law will not imply a contract where from the nature of the case the parties cannot legally make an express contract.* Simpson v. Bowden, 33 Me. 549. Bishop says: 'When the law lays on one a duty to another, it creates a promise from the former to the latter to discharge the duty. The limit of the doctrine is that where, from the nature of the case, not merely from inability of the party, there could not be a contract in fact, the law does not undertake to create the impossible.' Bishop on Contracts (2d Ed.) secs. 182-186." (Italics ours.)

Williams Stake & Co. v. Roth, 154 N. Y. S. 213, involved a case similar in facts and identical in principle to the case at bar. In said case there was involved a statute which prohibited any person from acting as a public insurance adjuster for hire or from receiving any money or compensation for services rendered without first procuring a certificate of authority to act as a public adjuster from the state, and the plaintiff in that case was employed by the defendant to adjust for the defendant a certain fire loss; and, further, the defendant solicited the plaintiff's services. The contract was silent as to any compensation to be paid for the plaintiff's services. The statute therein involved was analogous to the Air Commerce Regulations of the Department of Commerce herein involved, in that said statute prohibited a broker from acting as an adjuster for compensation for a client when the broker possessed no such license, but the law permitted such broker to adjust without compensation.

In reference to the right to imply a contract for the payment of services rendered under the principle of *quantum meruit,* the Court said (p. 215):

> *"Where the law expressly forbids a person to perform services for compensation, but expressly permits him to perform them without compensation, then the law can certainly not imply a promise to pay compensation for such services. There was, consequently, no implied promise to pay for any services performed at the request of the defendants made on January 2d, * * *."* (Italics ours.)

In view of the fact that the negotiations between Halcomb and Rose were entirely silent upon the question of the payment of compensation for the flight, and in view of the fact that Rose under a private pilot's license could legally transport Halcomb *without compensation,* the law cannot imply a promise to pay compensation for such service. To the contrary, the law must imply that the contract, if any, between the parties was a legal contract, that is, an agreement for transportation without compensation.

The law is a part of and enters into every contract, and is included in the terms thereof as fully as if the law were expressly referred to and incorporated in its terms.

In *Burke v. Meyerstein,* 94 Cal. App. 349, the Court, on page 353, stated:

> "Parties are presumed to have contracted with reference to laws in existence at the time the contract was made; and when a law affects the *validity,* construction, discharge, or enforcement

> of the contract *it enters into and forms a part of it,* measuring the obligations of one party and the rights acquired by the other (citing cases)." (Italics ours.)

In *General Paint Corporation v. Seymour,* 124 Cal. App. 611, 12 Pac. (2d Series) 990, the principle applicable in this case is declared to be as follows:

> "The law formed part of the contract, and it must be presumed that the parties contracted with knowledge of that fact."

In *Bobzein v. New York Central R. Co.,* 176 N. Y. S. 407, quoting from page 410, it was said:

> "The shipment was one in interstate commerce, and the provisions of the Interstate Commerce Act are to be read into the contract of transportation."

In the case last quoted, the bill of lading was silent as to the obligation of the carrier to provide the icing for the carload of peaches involved. The Court held that inasmuch as the Interstate Commerce Act, that is, the Carmack Amendment thereto, provided that the initial carrier should be liable for transportation, that it is liable for the icing as a part of the contract of shipment.

Since neither under the Federal law nor the State law there could be a fare paying passenger except in an aeroplane operated by an operator licensed to carry passengers for fare, the language in the policy, to-wit, "a fare paying passenger", must be read with regard to the law and to the same extent as if the provisions of the law above referred to were inserted

in the policy. In other words, the expression, "a fare paying passenger", as used in the policy, necessarily means that to constitute such, such passenger must be in an aeroplane which is operated by a pilot who is authorized by law to carry passengers for hire.

In *Northern P. R. Co. v. Wall,* 241 U. S. 87, 60 L. ed. 905, 907, it is held:

> "As this court often has held, the law in force at the time and place of the making of a contract, and which affect its validity, performance, and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

If such was not the law, then the provision of the double indemnity clause of the policy involved herein would have no purpose, for the payment of a fare by itself does not decrease or lighten the risk covered by the single indemnity provision. On the contrary, flying with a pilot who is authorized and permitted by law to collect a fare certainly covers a slighter risk than riding with a pilot who holds no such transport license. The law points the reason for the language of the double indemnity provision of the policy and not the mere fact of the paying of a fare.

In conclusion, upon this point, it is clear that the plaintiff's intestate was not a fare paying passenger, either in fact or in law, and therefore the relationship, upon which the right to collect under the double indemnity clause must be premised, was never created, to-wit, that of a fare paying passenger.

III.

A CONTRACT MALUM PROHIBITUM CANNOT BE ENFORCED IRRESPECTIVE OF WHETHER ONE OF THE PARTIES TO SUCH CONTRACT WAS NOT IN PARI DELICTO.

Conceding for the purpose of argument only that Halcomb intended to pay a fare or consideration for said aeroplane excursion, still there would not be thereby created a valid and legal contract of transportation under which the relationship of passenger and carrier could be created. In order for a person to be a fare paying passenger, it is necessary that there be a contract of carriage, which contract should have all of the elements necessary for a legal contract.

Section 1550 of the Civil Code of the State of California provides:

> "It is essential to the existence of a contract that there should be:
>
> 1. Parties capable of contracting;
> 2. Their consent;
> 3. *A lawful object;* and,
> 4. A sufficient cause or consideration."

The purported contract of carriage in the case at bar was not between parties capable of contracting nor did it have a lawful object. The Act of Congress of May 20, 1926 (Title 49, U. S. C. A., page 24 of the 1923 Cumulative Annual Pocket Supplement) directs the Secretary of Commerce to make certain regulations in reference to the registration of aircraft, and also in reference to the issuance, suspension and

revocation of certificates for the operation of aircraft. Pursuant to said direction, the Secretary of Commerce has made certain regulations, copies of which were introduced in evidence. (R. 109-110.) Particular reference is made to Subdivision (e) of Section 46 of said Air Commerce Regulations, which provides:

> "Private pilots * * * shall not carry persons or property for hire in licensed or unlicensed aircraft."

The said Air Commerce Act of 1926 (Title 49, U. S. C. A., pages 29 and 30 of the 1932 Cumulative Annual Pocket Supplement) provides:

> "It shall be unlawful * * *
>
> (4) To serve as an airman in connection with any aircraft registered as an aircraft of the United States, or any foreign aircraft, without an airman certificate or in violation of the terms of any such certificate."

As a penalty for such violation, Subdivision (b) of said Act of Congress provides that a person violating said section shall be subject to a penalty of $500.00.

The State of California has adopted all Federal laws and regulations for the licensing of aircraft, airmen and air navigation facilities. (See Chapter 850, Statutes of California for 1929, pages 1874 to 1877, both inclusive.) Said statute of the State of California, in part, provides:

> "Sec. 5. * * * it shall be unlawful for any person to act as an airman in any capacity, except

that for which he is licensed under the laws of the United States or any regulations adopted pursuant thereto.

Sec. 6. The certificate of the licensee, required by section 5 of this act, shall be kept in the personal possession of the licensee when he is operating aircraft within this state and must be presented for inspection upon the demand of any passenger, * * *.

Sec. 8. Any person, firm, association or corporation violating any of the provisions of this act, which violation is not herein declared to be a felony, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or be subject to both such fine and imprisonment."

Ollie A. Rose, as a private pilot, pursuant to the laws and regulations above set forth, was prohibited from operating or piloting an aeroplane for the carriage of passengers or property for hire. Therefore, the subject-matter of the contract implied by the verdict of the jury and the judgment of the Court covered a subject-matter prohibited by both the Federal and State laws.

It is true that the subject-matter of such contract was *malum prohibitum* and not *malum in se*. The District Court, in its opinion, held that a contract *malum prohibitum* confers certain rights and for certain purposes has a legal existence, and in support of that holding cites two California cases involving

the sale of securities which were made in violation of the provisions of the California Corporate Securities Act (Blue Sky Law). The cases cited are:

Hemmeon v. Amalgamated Copper Mines Co., 95 Cal. App. 400;

Becker v. Stineman, 115 Cal. App. 740.

These cases do not hold that contracts for the purchase of securities in violation of the Blue Sky Law are enforceable in favor of the innocent party, but, to the contrary, they hold that such contracts are void for all purposes and utterly unenforceable by Courts of law or of equity. But said cases do hold that the innocent party to said contract may recover from the party violating the statute, all considerations or things of value that he has paid or performed under said void contract, in an action based upon *quantum meruit* or *quasi*-contractual principles. An action based upon *quantum meruit* is not an action upon a contract, but it is independent entirely of the contract.

In the case of *Hemmeon v. Amalgamated Copper Mines Co., supra,* the District Court of Appeal adopted and quoted from *Smith v. Bach,* 183 Cal. 259. In the last mentioned case the Court clearly holds that contracts *malum prohibitum* are void and that it is immaterial whether the thing forbidden is *malum in se* or *malum prohibitum.* In that regard the Court said, on page 262:

> "The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the

statute does not expressly pronounce it so, and *it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum.* A statute of this character prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way. (13 Cyc. 351; 13 Corpus Juris., p. 410.) The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. (*Berka v. Woodward,* 125 Cal. 127 (73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777), and cases cited; *Bentley v. Hurlburt,* supra.)" (Italics ours.)

The Court in said case further held that the purchaser under such illegal contract, if he is not *in pari delicto,* may recover the *consideration paid under such illegal contract not upon the basis of enforcing the illegal contract,* but, on the contrary, on the basis that a contract is implied by operation of law under the theory of *quasi*-contracts to prevent the party *in pari delicto* from becoming unjustly enriched.

In other words, to permit the purchaser of stock in violation of the Blue Sky Law to recover the purchase price paid does not require an enforcement of a void or illegal contract, but, to the contrary, it is necessary, first, that the contract be declared void and illegal, and being void, the innocent party is then entitled to recover what he paid thereon to prevent the guilty party from becoming unjustly enriched or to permit him to profit by his own wrong.

This question has been before the Supreme Court of the State of California in a later case, to-wit, *Pollak v. Staunton,* 210 Cal. 656, wherein the Court held, at page 662:

> "Where stock has been issued without a permit it is void by the terms of the act (sec. 12), and the purchaser who is ignorant of such unauthorized issue may recover payments made by him on account of the purchase price. (Citing cases.) *An action for money had and received is an appropriate proceeding in which to obtain relief.* (Citing cases.)" (Italics ours.)

On page 665 said Court states that the recovery of the purchase price so paid by such innocent purchaser does not require such innocent party to enforce an illegal transaction, but that recovery is based upon *quasi*-contractual principles. In that connection, the Court said:

> "The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received."

Said Court, on page 663, further said in this respect:

> "Plaintiff could not by his conduct ratify or impart validity to the void contract and void stock. As said by the court in *Reno v. American Ice Machine Co.*, 72 Cal. App. 409 (237 Pac. 784): *'Such a contract has no legal existence for any purpose and neither action nor inaction of*

a party to it can validate it and no conduct of a party to it can be invoked as estoppel against asserting its invalidity'." (Italics ours.)

In *Tatterson v. Kehrlein,* 88 Cal. App. 34, it was held that a statute of this character prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum,* and, further, that such illegal contracts could not be enforced irrespective of the conduct or ratification of the innocent party. On page 49, the Court, in this respect, said:

> "'The doctrines of estoppel by conduct and ratification have no application to a contract which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as estoppel against asserting its invalidity.' (*Reno v. American Ice Machine Co., supra;* see, also, *Colby v. Title Ins. Co.,* 160 Cal. 632 (Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913); *MacRae v. Heath,* 60 Cal. App. 64, 72 (212 Pac. 228); *Reilly v. Clyne,* 27 Ariz. 432 (40 A. L. R. 1005, 234 Pac. 35, 39).)
>
> The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not *in pari delicto,* and the buyer may have judgment for the money paid out by him under the illegal

> contract, and may have the contract, the stock certificates and promissory note given in payment of such stock canceled."

Reference is also made to *Walker v. Harbor Realty Corp.,* 214 Cal. 46, 48.

In citing and applying the rule enunciated in the *Hemmeon* and *Becker Cases*, the District Court appears to have totally overlooked the fundamental difference between the parties involved in those actions and the parties involved in the case at bar. In the two cases cited, the actions involve disputes *between the immediate parties to the allegedly illegal contract* which were brought to determine their respective rights *as between themselves* under such contract.

The case at bar is not one between such parties. The defendant was not a party to the illegal contract and had no knowledge of it. Nevertheless, the plaintiff is relying on the illegal agreement with Rose as her foundation for a claim against a party having no knowledge of or connection with the illegal agreement depended upon.

Whatever may be the respective rights or equities as between the immediate parties to such illegal agreement, it is difficult to understand how a valid claim against a third party can be founded on an illegal agreement with a totally different party. At most, all that these cases hold is that the *innocent party* to said contract may recover from the guilty party, and such recovery is limited to such consideration or things of value that the innocent party has paid or performed

under said void contract, *in an action based on quantum meruit or quasi-contractual principles.*

No question of an innocent or guilty party is involved in the present action. It does not involve a claim by an injured party against the other party to a transaction wherein the injured party was overreached. For these reasons the *Hemmeon* and *Becker Cases* are not binding nor do they enunciate the proper rule to be applied in this case.

In the case at bar the plaintiff is not seeking to recover upon *quasi*-contractual or unjust enrichment principles, but is seeking to premise a recovery upon the relationship of passenger created by a purported contract which is prohibited and forbidden by law. In other words, in order for appellee to succeed in the case at bar he must establish the relationship of a fare paying passenger, and to do so he is asking the Court to create that right or relationship by implication that it existed under and pursuant to an illegal or void contract, if made. The contract being *malum prohibitum,* it is void for all purposes and no legal rights can be supported thereon or thereunder.

In *In re T. H. Bunch Co.,* 180 Fed. 519, the Court stated that:

> "The law is well settled that, if the plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover if the defendant has possession of a thing of value belonging to plaintiff."

and cited in support thereof *Dent v. Ferguson,* 132 U. S. 50, 33 L. ed. 342. Said Court further stated that the test of illegality is as follows (page 525):

> "'The test of illegality to determine whether plaintiff is entitled to recover *is his ability to establish his cause of action without aid from an illegal transaction.*'" (Italics ours.)

In *Miller v. Ammon,* 145 U. S. 421, 36 L. ed. 759, the Supreme Court of the United States stated (page 428, U. S.):

> "Passing to the other question, that must be answered in the negative. *The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.* * * *
>
> In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. *There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act.* By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative;

> and *it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty.* There is, therefore, nothing in the language of the ordinance or the subject matter of the regulations which excepts this case from the ordinary rule, that an act done in disobedience to the law creates no right of action which a court of justice will enforce." (Italics ours.)

Since, in the case at bar, both the law of the State of California and the Act of Congress expressly prohibit and declare unlawful any contract or act in violation of the Commerce Regulations and prescribe penalties for violations thereof, and since there is nothing in either of the laws which shows any intention on the part of Congress or the Legislature of the State of California to limit their operation and scope to the exacting of the penalty or fine, it is therefore clear that contracts made in violation thereof are void for all purposes.

Had Halcomb in fact paid a fare to Rose, his administrator might, under these and other cases, have recovered it; further, if Halcomb had promised to pay a fare to Rose, Rose's estate could not have recovered it. In neither case would an effective contract have existed, and much less can one be held to have existed here where there was neither payment nor promise.

In order for the plaintiff (appellee herein) to recover under the double indemnity clause of said life

insurance policy, it is necessary to show that he was a fare paying passenger, and that cannot be shown unless it is proved that there was a legal contract of carriage wherein and whereby he was legally obligated to pay a fare. In this proof the appellee has failed.

IV.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE OF THE PRIOR VIOLATIONS BY MR. ROSE OF THE AIR COMMERCE REGULATIONS AND OF THE LAW OF THE STATE OF CALIFORNIA.

The Court permitted, over the objection of the defendant, the witness Halcomb to testify that on one occasion, some three months prior to the accident in question, Pilot Rose charged a fare for transportation in an aeroplane operated by himself. This evidence is entirely immaterial, incompetent and irrelevant. Proof of the violation of the law on one separate and distinct occasion is no proof of a violation under a separate and independent occasion. See, *Larson v. Larson,* 72 Cal. App. 169.

Keiter v. Miller, 170 Atl. 364, 365;

Listle Coal Co. v. Farmers' Bank, 135 Atl. 105, 106;

Williams v. Atl. Coast Corp., 134 S. E. 390, 394;

42 *C. J.* 744.

To permit the jury to imply from the evidence of the witness Halcomb that because of this separate and independent occasion some three months earlier, there was an implied contract that a fare would be charged

and paid on this occasion, is to permit the jury to imply that on the occasion in question the law had been violated contrary to the presumption created by the law of the State of California. (Section 1963 of the Code of Civil Procedure of the State of California.)

The said Code section of the State of California above referred to provides for certain presumptions: "(1) that a person is innocent of crime or wrong;" "(2) that the ordinary course of business has been followed;" and "(3) that the law has been obeyed."

The evidence, in reference to the flight in question, was undisputed that nothing was said or agreed upon between the parties as to the payment of a fare or a consideration, and therefore the presumptions above quoted must be drawn by the jury. No inference may be drawn from one isolated prior occasion or incident to rebut the presumption arising from a separate and distinct incident or transaction.

The presumption that the law has been obeyed is reinforced and corroborated by the presumption that the ordinary course of business has been followed. Mrs. Rose testified, as heretofore stated, that it was Mr. Rose's policy on all occasions to require the transport pilot, hired by him, to carry all fare paying passengers. (R. 103.) The fact that the ordinary course of business was violated on one occasion cannot destroy the effect of that presumption. The error in admitting this testimony was highly prejudicial in that the Court instructed the jury in effect that the inference from this one violation should be weighed against the presumptions heretofore cited. (R. 128.)

V.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN THE PARTICULARS HEREAFTER STATED.

The Court refused to give the following instruction requested by said defendant, to-wit:

> "You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed." (R. 83-84.)

The Court, however, charged the jury as follows:

> "The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that such pilot, Ollie A. Rose

was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law had been obeyed. This presumption is to be considered with all the other evidence in the case, to determine whether or not George R. Halcomb was a fare paying passenger in the wrecked aeroplane." (R. 84.)

"It is for you gentlemen of the jury to say, from all the evidence in this case, whether there was an implied contract that the deceased was to pay a fare for the use of the plane." (R. 85-86.)

The instructions so given by the Court permitted the jury to disregard the presumptions declared by law and to infer from the fact that a fare was paid illegally on one isolated occasion, that George R. Halcomb was a fare paying passenger at the time in question, occurring some three months subsequent to the flight testified to by witness Halcomb.

As stated heretofore, the proof of the violation of the law on one occasion is not proof of the violation on a separate and distinct occasion. (See cases cited under preceding point.) Further, under the instructions given by the Court the jury was authorized to imply a contract covering the subject-matter which the law prohibited the parties from expressly contracting thereon; or, in other words, the Court instructed the jury that George R. Halcomb could be a

fare paying passenger in an aeroplane even though he did not pay a fare and was not legally bound or obligated to pay a fare.

The instruction was erroneous for the further reason that there was no evidence from which a contract to pay a fare could be implied. The evidence as to payment on a *former* occasion, even if properly admitted, afforded no basis for implication of an intent to pay a fare on *this* occasion, because the circumstances were entirely different. Here the circumstances and the proven facts as to the conversation show that the transaction was not regarded as a commercial one nor the flight so undertaken. Human life was in danger—Halcomb's brother was lost. Halcomb appealed to Rose for help and Rose responded "I will do anything I can * * * to help you". There is no suggestion here of commercial motives nor expectation of reward or compensation. It was a humane response to a human appeal. To imply a contract for the payment is to impune the motives of Rose.

CONCLUSION.

The phrase in the life insurance policy in question, to-wit, "a fare paying passenger", must be construed to mean a passenger in an aeroplane who has paid a fare under a legal contract of carriage. Here there was no payment of a fare and no express contract to pay a fare. If there was any contract it must be implied. The law will not imply the creation of an illegal contract. If a contract was created, it was illegal and

hence unenforceable and did not constitute Halcomb a "fare paying passenger" within the meaning of the policy. It is the policy of the law to presume that the law has been obeyed and not violated, and if this said policy is adopted in this case, the presumption and inference is that Ollie Rose was transporting George R. Halcomb without compensation, which he was authorized to do under the law. It cannot be implied that he was transporting said George R. Halcomb for a fare or compensation, which he was prohibited by law from doing.

It is submitted that the judgment of the United States District Court should be reversed, with directions to enter a judgment in favor of the plaintiff in the sum of $1929.20, under the single indemnity clause of said insurance company.

Dated, Sacramento, California,
February 25, 1935.

Respectfully submitted,

DEVLIN & DEVLIN & DIEPENBROCK,
HORACE B. WULFF,
Attorneys for Appellant.